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SUPREME COURT OF THE UNITED STATES

OCTOBER, 1942, TERM

No. 905

J. W. SANDERS COTTON MILL, Inc.,
PETITIONER
vs.
LULA MOODY, RESPONDENT

BRIEF FOR RESPONDENT LULA MOODY, IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED SATES

OCTOBER TERM, 1942

J. W. Sanders Cotton Mill, Inc., Petitioner

vs.

LULA MOODY, Respondent

JURISDICTION

Grounds upon which the jurisdiction of this Court is invoked is Section 240 of the Judicial Code as amended by Acts of February ,1925, subsections A and B separately and severally, 28 U.S.C.A. 347, and also Rule XXXVIII of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939.

STATEMENT OF CASE

On November 29, 1938, Respondent Moody filed a declaration in the Circuit Court of Lauderdale County, Mississippi, against Petitioner J. W. Sanders Cotton Mill, Inc., charging in general terms the petitioner, by whom she was employed as a spinner, negligently failed to keep its machinery in repair to the hurt of respondent in the sum of $22,000. The pleas of the petitioner denied all negligence charged, denied that respondent was even injured in said mill.

Trial was had in April 1939. Judgment was recovered by respondent for $7,000 against petitioner. Thereupon petitioner appealed to the Supreme Court of Mississippi. On considering the appeal, quite a lengthy opinion was

written by the Court reversing the cause and remanding it for a new trial. See *J. W. Sanders Cotton Mill v. Moody*, 189 Miss. 284, 195 So. 683.

In the course of the opinion the Court pointed out that the declaration was in general terms. No bill of particulars was furnished and from the range of the testimony, the instruction on liability it was impossible to tell whether general defects of all the machinery or a particular defect of a particular machine was relied on for a recovery; that also the instruction on liability was errorneous; that both respondent and petitioner went too far into collaterals; that the record on a retrial of the cause should not be cluttered up with defenses having no place in the case. The declaration was amended to specifically charge injury was caused by a defect in a particular unit of a machine.

A retrial was had in conformity with the opinion rendered on the first appeal. Again the jury found for respondent in the sum of $7,000.00 From this judgment again petitioner appealed to the Supreme Court of Mississippi. Again the Supreme Court reversed the case, this time on a point in no way involved in the first appeal. See *J. W. Sanders Cotton Mill v. Moody*, 190 Miss. 604, 2 So. 2d 815.

The third trial was had in conformity with the Court's opinion in its decision of the second appeal of this cause. A verdict of $8,000.00 was had by respondent against petitioner. From this judgment petitioner appealed, but as there was nothing in this appeal that had not been decided adversely to petitioner on the second appeal, the Mississippi Supreme Court affirmed this cause without writing

an opinion thereon. *J. W. Sanders Cotton Mill v. Moody*, 110 So. 2d 544.

A suggestion of Error was filed by Petitioner, J. W. Sanders Cotton Mill, Inc., attacking the affirmance of the case by the Supreme Court of Mississippi. This Suggestion of Error was overruled.

The case has now been brought to this Court upon Petition for Certiorari upon the contention that the State Supreme Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

ARGUMENT

(a) Due Process

Petitioner contends that it has been denied due process. The most frequent definition of due process is a right of notice before being proceeded against and an opportunity to defend the action.

There were three trials of the cause involved here in the Circuit Court of Lauderdale County, Mississippi; three appeals to the Mississippi Supreme Court by petitioner from adverse judgments and also a suggestion of error was filed before the Mississippi Supreme Court by petitioner and overruled. This cause originated nearly five years ago and has been constantly litigated since.

The right to be heard does not mean that such right

in one cause shall go on forever like Tennyson's brook. Under the admitted history of this cause, only unusual and startling conditions would justify further consideration of this cause, and such are entirely lacking in it. This is an ordinary personal injury suit with no unusual features.

Petitioner contends the overruling of its motion to quash the jury panel in the Circuit Court of Lauderdale County was a denial to it of due process. The motion is found on pages 9 and 10 of the record. Petitioner offered no evidence in support of the motion, *Glasser v. United States*, 315 U. S. 85. Respondent offered evidence thereon, and it clearly showed there was no merit to the motion. The trial court very properly held: "There is certainly no semblance of anything irregular that has been proven in this motion."

"There are a lot of charges, but nothing has been proven in this motion." "There are a lot of charges, but nothing has been proven." R. 26.

The following is from page 27 of the record:

"By Mr. Miller: I will ask the Court to pass on this charge specifically, whether it is sustained by the proof that the sheriff has a financial interest in this case.

"By the Court: From the facts the Court finds that he has not. It has been positively sworn by the sheriff that he has no financial interest whatever, and counsel for the plaintiff testifies that he has no financial interest in it. There is no testimony that he has." R. 27.

Petitioner relies largely on and quotes extensively from *Oliphant v. State*, 153 Tenn. 130, 282 S.W. 206.

In that case is also found:

"Upon a verdict of guilty he was fined $100 and given a sentence of 60 days in the county jail. * * * *

"The record further discloses it was the practice of the sheriff and his deputies in Dickson County to divide one-half the fines so appropriated to the sheriff and collected in cases involving a violation of the prohibition laws under this resolution.

"The record further discloses that at the October term, 1925, of the Quarterly County Court of Dickson County that Court appointed twelve jurors, exclusive of the Grand Jury, to serve at the December term, 1925, of the Circuit Court of said County as provided by Section 5793 of Shannon's Annotated Code. In addition to this regular panel the term (December 1925) the Court directed the sheriff to summon from the body of the County six additional names to serve during that term of Court. Pursuant to this order the sheriff, or his deputies, summoned the following Jurors, to-wit: W. H. Baker, Earl Bishop, H. H. Orgain, C. H. Osborne, Charles Elliott and J. J. Beck, all of whom appeared in Court on the second day of the term, and were qualified in open Court as talesmen to serve as Jurors during the term.

"When the instant case was called for trial, and after the state and the defendant had announced ready,

the defendant moved the Court to have the regular jurors who had been regularly appointed by the Quarterly County Court, to take their seats in the jury box.

"The Court overruled this motion and directed that the record show that prior to its being made, the instant case had been called for trial; that both the state and the defendant had announced ready, and the state had accepted the jury, composed in part, of the Jurors hereinbefore named, who had been summoned by the sheriff, or his deputies, pursuant to the order of the Court hereinbefore referred to. To this action of the Court the defendant excepted.

"Thereupon the defendant challenged for cause the jurors who had been summoned by the sheriff, or his deputies pursuant to the order of the Court because they were selected and summoned by officers financially interested in the event of the case, which motion the Court overruled, and to which action of the Court the defendant excepted.

"The defendant then peremptorily challenged the jurors Beck, Orgain and Elliott, thus exhausting the three challenges to which he was entitled under the statute. He thereupon moved the Court to exclude from the jury the remaining jurors who had been summoned by the sheriff, or his deputies, pursuant to the order of the Court hereinbefore referred to, because selected by officers who were financially interested in the event of the case. This motion was likewise overruled by the Court, to which ruling the defendant excepted. The result was that the defendant

was forced to go to trial before a jury composed, in part, of jurors selected and summoned by the sheriff in the manner hereinbefore stated, with the result hereinbefore stated. * * * *

"However, it results that, for the error of the Court in overruling defendant's challenges for cause, the jurors selected and summoned by the sheriff, or his deputies, who were financially interested in the result of the case, the case will be reversed."

In this same opinion is found:

"It is not necessarily a ground of challenge that the officer who summoned the jury is a witness in that case unless the statute so provides * * * ."

In petitioner's motion no effort was had to have the jury panel quashed on the ground that the sheriff was a witness in the case, that he was unfair or biased or corrupt. It was confined to the charges (a) the sheriff is the attorney of record for the plaintiff; (b) that he is financially interested in the case; (c) that he performed all duties with reference to drawing and summoning the jury; (d) that he as sheriff was custodian of the Court house including the Jury room; (e) that he was the personal attorney of M.V.B. Miller associate counsel in the cause. All evidence was to the contrary.

It will be noted that Fred Ross, Sheriff, was one of the counsel in this case when it was tried first in April, 1939. Thereafter in August he was nominated as sheriff; in November he was elected sheriff for a four-year term, be-

ginning January, 1940. Ross did not have any part in representing respondent on the first appeal. When this cause was reversed by the Supreme Court on its opinion of the first appeal rendered May 6, 1940, Ross advised respondent Miss Moody he could have nothing further to do with the case, that he was prohibited by law from practicing law while serving as sheriff. It was positively shown that he had no financial interest in the case and that respondent so understood it, R. 13, 16. The attorney representing respondent throughout these trials and on all appeals also testified Fred Ross would receive no part of any fee from the cause, had no financial interest in the cause, R. 22.

Counsel's statement on page 2 of the petition that Miller was attorney for Ross has no foundation. In fact, Ross had no occasion for an attorney the two years he had been sheriff. The record doesn't show he ever consulted an attorney during that time, R. 14.

It is seen at a glance that there is no proof supporting the motion to quash the panel, that under the holding of the Oliphant case cited above and relied on by petitioner, the trial court of Lauderdale County, Mississippi, was correct in its ruling. This question had already been decided adversely to petitioner's contention by the ruling of the Mississippi Supreme Court in the decision of the second appeal of this cause.

At this point we call the Court's attention to the following in counsel's brief: "It should be observed from the statutes mentioned above that no step may be taken for the selection, drawing, and summoning the jury without the concurrence of the sheriff," Petitioner's brief, P. 28,

and "The names could not be placed in the jury box without his concurrence," Petitioner's brief, P. 37. Counsel is in error. The sheriff has no duty or part in selecting the names of the jurors placed in the jury box. It is not so charged in the motion to quash the jury panel. The following is from the motion:

"IV

"That the said Fred A. Ross, acting through himself or his deputies, has performed all of the duties laid upon the (fol. 17) Sheriff by law in the drawing and summoning of the juries constituting the panel for the week at which said case is set for trial." R. 9.

Counsel on page 18 of petitioner's brief cites only a part of Section 2033 of the Mississippi Code of 1930. The whole section shows counsel has no foundation for an assertion that the sheriff has any duty in connection with the selection of or placing jurors names in the jury box.

Section 2033 of the Mississippi Code of 1930 is as follows:

"2033. How list of jurors procured.—The board of supervisors at the first meeting in each year, or at a subsequent meeting if not done at the first meeting, shall select and make a list of persons to serve as jurors in the circuit court for the twelve months beginning more than thirty days afterward, and as a guide in making the list they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them as nearly as they conveniently can, from the several supervisor's dis-

tricts in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors. Said clerk shall put the names from each supervisor's district in a separate box or compartment, kept for the purpose, which shall be locked and kept closed and sealed, except when juries are drawn, when the names shall be drawn for each box in regular order, until a sufficient number is drawn. The board of supervisors shall cause the jury box to be emptied of all names therein, and the same to be refilled from the jury list as made by them at said meeting. If the jury box shall at any time be so exhausted of names as that a jury cannot be drawn as provided by law, then the board of supervisors may at any regular meeting make a new list of jurors in the manner herein provided."

The proof shows without dispute that the Circuit Clerk is custodian of the jury box, that he, together with the Chancery Clerk, a Mr. Howard Cameron, a cousin of counsel for the petitioner and Mr. Isaacs, deputy sheriff drew the names from the jury box for all five weeks of Court as is provided by law, that as to the manner of the drawing, the testimony of Deputy Sheriff Isaacs is undisputed. It is as follows:

"Q. When you picked up a slip what did you do?

"A. I passed it to Mr. Ferrill. He read the name and Mr. Bledsoe typed it.

"Q. Was there any effort at all to obtain any particular juror?

"A. No, sir, every one as I picked it up I would pass it over. I didn't even read the thing myself.

"Q. Didn't look at it yourself?

"A. No, sir.

"Q. Didn't know who it was?

"A. No, sir.

"Q. Now, the circuit clerk is the custodian of the jury box?

"A. Yes, sir.

"Q. Where was it drawn?

"A. In his office, back office.

"Q. In the circuit clerk's office?

"A. Yes, sir." R. 24.

The holdings in cases cited by petitioner on the question of the quashing the jury panel are contrary to his contentions here. The case of *Ulmer v. Pistole,* 115 Miss. 435, 76 So. 522, is cited by petitioner:

"Appellant contends that the court erred in refusing to sustain the challenge and motion of defendant to quash the entire panel of jurors summoned to serve during the week of court in which this case was set for

trial, on the ground that W. R. Pistole, a brother of appellee W. H. Pistole, was the chancery clerk of Lauderdale county, and was clerk of the board of supervisors, and as such assisted in selecting the list of jurors and in drawing the names from the box to serve as jurors at that term of court while this case was pending for trial therein. It is urged that:

" 'For sound reasons of public policy the appellant should not have been forced to bear any of the possible consequences of the situation, even though no actual fraud was shown to have been committed.'

"This principle contended for by appellant is well established in the common law, and is based upon the old idea that a person should not be placed in a position where there will arise a conflict between interest and integrity; that the temptation to do wrong should not be afforded by opportunity for fraud. We do not dispute the soundness of this view, and in proper cases the application of this principle should be made, but the case before us does not come fairly within this rule. The record here discloses that the testimony taken on the hearing of the motion demonstrated clearly and conclusively that no fraud was committed in securing the jury under the directory terms of the statute providing the method of obtaining jurors. It appears that the chancery clerk did not as clerk of the board of supervisors select the names placed in the jury box, but this was done by the members of the board of supervisors from their respective districts. In drawing the list of jurors from the box the clerk did not select the names, but drew them in a mechani-

cal way, not having any discretion or knowledge as to what names would be drawn as jurors for the term of court. The undisputed proof in the record shows that the clerk did not in any way select or discriminate in the drawing of the jurors from the box. So it abundantly appears that no fraud was practiced, and that there was little or no opportunity for fraudulent conduct. Section 2716, Code 1906, provides that 'a challenge to the array shall not be sustained, except for fraud.' Under the particular facts here we cannot say there was fraud or even a well-grounded suspicion of it." *Ulmer v. Pistole,* 115 Miss. 435, 76 So. 523.

The Pistole case makes it clear that there was no error in the trial court's action in overruling petitioner's motion to quash the jury panel. That decision was controlling on the Mississippi Supreme Court and is likewise controlling on this Court, because there is nothing repugnant to the Federal Constitution therein. The only other decision cited by counsel that even is remotely helpful is the case of *Lipscomb v. State,* 76 Miss. 223, 25 So. 158.

In that case is found:

"But, again, if the appellant had a fair and impartial trial, what right has he to complain that the duties of a ministerial office pertaining thereto were performed by one person rather than another, if it appear, as it does in this case, that nothing prejudicial to him or his rights was done by the person who did in fact exercise the functions of the office? We think he has none, and we cannot find warrant, in any view of the case, for reversing the conviction appealed from

because the court required the coroner, against whom no objection was averred, to act as sheriff during the trial." 76 Miss. 246.

In the case at bar the only duties performed by the sheriff were ministerial duties, that of mechanically drawing from the jury box a slip containing a prospective juror's name and, without looking, pass it on to the Chancery and Circuit clerks to be by them read and listed, and summoning the jurors selected. There is no charge that he failed to summon a juror listed, no charge that he failed in any respect to do his full duty or that he was guilty of any wrong or attempted wrong is summoning the jury.

The matter of whether the jury panel should be quashed was not a new question on the third trial. Ross was sheriff when the second trial was had. A motion to quash the panel then was had, based on the grounds, the present motion is based on and the additional ground that a mandatory provision of Mississippi Jury Statutes was not followed. In deciding the second appeal of this cause, the Mississippi Supreme Court said:

"The main ground urged for reversal of the judgment is the action of the court in overruling appellant's motion to quash the panel for the week, from which the jury was to be drawn to try the case. Only twelve of the jurors drawn from the jury box qualified. The tales-jurors were summoned by a constable of the county, under the direction of the judge. They were not drawn from the jury box as required by chapter 304, Laws of 1938. The officer summoning the tales-jurors were given the following instructions

by the Court: 'You can get them in town. I don't want you to take time to go out in the country. Now take this in record. I want you to get me good, fair, honest citizens, scattered from the county as much as you can by going in the city and bringing them up. I want you to bring me men that have not served on the jury in two years. You ask them that question and ask them if they are qualified voters. That is all you ask them. I don't want a bunch of men that have served on the jury in two years and delinquent voters brought up here on the expense of the county. Understand, thirteen, and get them for me as soon as you can, and you are working under the direction of this court as an officer of this court, and bring them in just as quick as possible, Mr. Bell. As you pick up one, have him come direct to me and report to me.'

"There was a jury box from which to draw the talesmen. The question is whether chapter 304 is mandatory or merely directory. We are of opinion that it is mandatory, and that the action of the court in summoning the talesmen was a complete departure therefrom. There was no pretense whatever of obeying the statute. * * * * 'The action of the county court, therefore, was not an irregularity; it was a procedure wholly beyond and outside of the law—a proceeding directly in the face of our statutes. The curative statute has no application to such a case. *Shepherd v. State,* 89 Miss. 147, 42 So. 544, 10 Ann. cas. 963; *Cook v. State,* 90 Miss. 137, 43 So. 618; *Lee v. State,* 138 Miss. 474, 103 So. 233; *Ellis v. State,* 142 Miss. 468, 107 So. 757'. The outstanding purpose of the statute was, so far as possible, to prevent the juries from being tamp-

ered with.

> "This question was properly raised in the court below by motion to quash the panel before the trial, and on motion for a new trial. It was not involved in the former appeal." 2 So. 2d 815.

The Mississippi Supreme Court in the decision of the second appeal would not have hesitated to also have held that the panel should have been quashed because of Ross' interest if it had been impressed that there was any merit in that ground. The cause was going back for a new trial. Ross, the chances were, would still be in office when the case was to be tried anew. The opinion was to be the guide for that trial. The above opinion was from the Court in Banc. No one of the six justices seemed the least bit impressed with cousel's contention that the jury panel should have been quashed because of Ross' interest. This contention has twice been before the Court, twice rejected.

Due process in the Fourteenth Amendment of the Constitution is due process according to the Constitution and laws of a particular state and not according to the other states of the United States. *State v. Felch,* 105 Atl. 23, 92 Vt. 477.

This Court, speaking through its Justice Cardozo in *Snyder v. Massachusetts,* 78 U. S. Rep. (Lawyer's ed.) 677, said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so

doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (citing cases) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser."

There is no merit in petitoner's contention that it is entitled to a review by this Court of this cause because due process was denied it.

(b) Equal Protection

Petitioner contends:

"That the action of the Supreme Court of Mississippi in declaring that no judgment should be allowed to stand where the trial had proceeded so far afield from the issues joined, and into wholly collateral matters, that it could not be determined whether or not the verdict was rendered upon the issues joined or upon the collaterals, establish the law of the case, as well as the law of the State of Mississippi; and its subsequent action in affirming the judgment here under review amounted to a denial to petitioner of equal protection of the law." Petitioner's Brief, P. 25.

Petitioner's argument in support of the above is based principally on misstatement of fact and misleading statements.

In the opinion rendered on the first appeal reported in 189 Miss. 284, 195 So. 683, is found:

"It is difficult to tell in the peculiar course which the trial took, whether plaintiff was relying (1) upon an alleged dereliction of duty of the employer as regards a particular mechanical instrumentality, or whether (2) upon dereliction in respect to the general system or situation which the employer is alleged to have allowed to prevail, and whether out of this, the negligence charged is to be found in the failure to use reasonable care to furnish a reasonably safe place to work. If we should look to the testimony of plaintiff herself, who alone witnessed the accident, we would conclude that the theory first stated was the one relied on; but when all the testimony introduced by plaintiff and her cross-examinations of defendant's witnesses, and the instruction obtained by her on the issue of liability are considered, it would seem that the second theory is made the chief reliance for the maintenance of plaintiff's case. The declaration is in rather general terms, and no bill of particulars was requested." * * *

"It was error, therefore, to give, in the case here before us, an instruction to the jury on the theory of a safe place to work" * * * *

"Upon the whole, it is our conclusion that the case should be retried upon clear-cut issues, upon instructions which lead to these issues, and wherein collateral issues shall be properly confined, and this by both sides to the case,—appellant being not entirely without fault on this score in this record. We cannot deal with everything covered in the more than 300 pages of the briefs in this case, but must in a few words

refer to four other matters: (1) The release pleaded cannot be sustained and ought to be omitted in a new trial. (2) The contention that the neb and clearer board were simple devices within the simple tool doctrine is not well founded. (3) The defense of assumption of risk has no place in the case, and the record and the testimony should not be cluttered up by it." *J. W. Sanders Cotton Mill, Inc., v. Moody,* 195 So. 683.

Before a retrial of this cause after the above opinion was had, the declaration was made more specific by amendment. When the case was tried the second time, it was tried in conformity to the opinion of the Mississippi Supreme Court's decision of the first appeal. The evidence was confined to the only one defect in the machinery, to-wit, the one causing injury of plaintiff. The error pointed out in the instruction on liability was avoided, and plaintiff's evidence, if not petitioner's, was much restricted as to collaterals.

On the appeal by petitioner everything that it urged for a reversal on the first appeal was again urged for reversal on the second appeal with the additional ground that the trial court erred in not quashing the jury panel because (a) The mandatory statute requiring all tales-jurors as well as petit jurors be drawn from the jury box; (b) the further grounds as set out on 9 and 10 of the present record in regards to the jury being drawn by Sheriff Ross, whom it was urged was attorney of record for respondent, financially interested, etc.

Responding to the numerous points urged for reversal in petitioner's appeal, the Mississippi Supreme Court sit-

ting in Banc in its decision of the second appeal, after holding that the jury statute of Mississippi requiring that all jurors, tales as well as regular jurors, be drawn from the box had not been complied with and that the case should be reversed for another trial solely on that ground, said: "We notice no other grounds for reversal. As heretofore stated, there have been two trials of the case and two appeals to this Court. All questions involved on both appeals have been thouorghly and ably argued." *J. W. Sanders Cotton Mill, Inc., v. Moody,* 191 Miss. 604, 2 So. 2d 816.

The third trial of this cause was had in conformity with the opinion rendered by the Mississippi Supreme Court in its decision of the second appeal. There were on the third trial nothing new. The pleadings, witnesses and evidence were the same and nothing for the Mississippi Supreme Court to write about, so the case was affirmed by it without an opinion.

Petitioner urges that the same errors that caused a reversal on the hearing of the first trial were put into the record on the third. To give color to his contention he quotes a few lines from the first opinion rendered by the Mississippi Supreme Court in this cause but carefully refrains from quoting that part of the opinion dealing specifically with collaterals. In that opinion is found:

> "In view of the general attitude of this record there are several other instances which occurred in the taking of the testimony which cannot escape the attention of an examiner who would responsibly grasp its import, and wherein collateral matters were unduly pursued. For instance, in the cross-examination of

> the witness, Anders, the spinner foreman of the mill. It may be that the methods of this mill in that it had no concern whatever as to the welfare or safety of its workers; that it engaged in the indirect subornation of witnesses; that its harsh course of work might be described as the stretch-out system, about which this witness was taken so severely in hand on cross-examination, may, if true, have made this concern an undesirable member of the community; but there is too much danger in allowing examinations to go to such lengths that the particular merits may be obscured and that passion may be aroused by these extraneous considerations. * * * * "and wherein collateral issues shall be properly confined, and this by both sides to the case,—appellant bein gnot entirely without fault on this score in this record." *J. W. Sanders Cotton Mill, Inc.*, 195 So. 683.

The collateral matters, as they are designated by petitioner are grouped on page 20 and 21 of its brief, are not collaterals. They are vital to issues involved.

Testimony about breaking of thread at various times and places, that operators moved fast and used hooks and instruments and where an operator's eye were centered at other times and places, how each operator performed the duty of spinning and how respondent performed the duty were not collaterals. Without testimony along the line petitioner designates here as collateral, the jury could not have passed on the question of whether respondent was using due care, whether she was guilty of contributory negligence, whether her own negligence was the sole cause of her injury, whether "the evidence showed there was a safe way to do the work as distinguished from an unsafe way,

and that respondent chose the unsafe way."

The above line of testimony, much of it being developed by petitioner, informed the jury as to the manner of the work, the implements used by the operators in the work, that there were duties constantly requiring eyes to be on the work being done, leaving no opportunity to an employee whose duties kept them on the move to be able to be looking out for the place of a defect. The usual method of work by spinners was a fact necessary to be shown. Otherwise, the jury could not pass on whether there was a safe way used there and whether respondent departed therefrom and adopted an unsafe way. All of the above line of testimony was gone into by petitioner as well as respondent. Petitioner complains about the showing of the age of the spinning frames. It developed that respondent had worked at these frames thirty years or longer, R. 75. Petitioner contends that error was put into the record by evidence on how the work of spinning was done three years, eighteen years before respondent was injured. Petitioner went into how the work was done thirty-five years before, R. 85. The machines were placed in the mill near the close of the nineteenth century. The respondent began her employment at that time. The method of performing their duties of employment never changed from that time on. Respondent was used to teach apprentices how to spin. She taught for petitioner the method she learned, R. 118, 119, 120. Petitioner is mistaken about showing anything that happened in other mills. A witness was asked if he had ever been in other mills, but the next question confined the method of operation to the mill in question, R. 138.

Petitioner here does not base its contention that it was not afforded equal protection on a claim that it had been arbtirarily accorded different treatment from others under like circumstances. The contention is that it received different treatment from one division of the Mississippi Supreme Court from that accorded it by the other division of that Court. Petitioner contends that as Division B of the Mississippi Supreme Court reversed and remanded this cause twice, that the equal protection clause of the Federal Constitution requires that it be reversed an equal number of times by Division A of the Mississippi Supreme Court.

Petitioner is wrong on its contention of fact as well as the law. Pages 26, 27, and 28 of petitioner's brief bring to the Court's attention the provision of the Mississippi Constitution creating Division A and B of the Court and also providing for six justices for the Court. It is repeatedly urged that Division A of the Mississippi Supreme Court denied the petitioner equal protection as it did not reverse this cause as did Division B of that Court, that in both appeals the facts were the same. The case on neither of the three appeals has been before Division B of the Court. The cause was before Division A on the first appeal, before the Court in Banc on the second appeal, and was affirmed by Division A on the third appeal.

What is sought to be done is put the Mississippi Supreme Court in a ridiculous light before this Court by picking out a few isolated bits of evidence regarding what counsel chooses to call collaterals, call this Court's attention to an excerpt from the Mississippi Supreme Court's decision on the first appeal of this cause, in which it was held the

plaintiff went too far into collateral matters, and lead this Court to believe that justices of the Mississippi Supreme Court deciding this cause on the third appeal had not theretofore taken part in the decision of this cause, were altogether unfamiliar with it until it reached them on the third appeal and that they entirely overlooked the holdings of the Court handed down by other justices of the Mississippi Supreme Court on the decision of the first appeal of this cause. The facts are that all six of the justices of the Mississippi Supreme Court have considered this case twice and the Chief Justice, who presides over Division A, took part in all three decisions.

It is not often a lawyer of any experience will again fall into the same error pointed out by an appellate court on a retrial of a case. The decision of the Mississippi Supreme Court delivered in Banc on the second appeal of this cause pointed out that the only error it again reversed the cause on was not even involved in the first appeal. The Court in its opinion said: "We notice no other grounds for reversal." *J. W. Sanders Cotton Mill, Inc., v. Lula Moody,* 191 Miss. 604, 2 So. 2d 815. Therefore, it is clear on the second trial of this cause error was not committed in regards to evidence. On the second and third trials the pleadings and evidence were substantially the same. Therefore, the law announced by the Mississippi Supreme Court on its decision of the appeal from the second judgment became the law of the case for its decision of the appeal from the third judgment in this cause. If counsel is in the least candid with the Court, he will not contend that there were different witnesses or that their testimony was different on the second and third trials of this cause. As the trial court on the third trial avoided the errors pointed out by

the appellate on the second appeal, there was nothing for the Mississippi Supreme Court to do but follow its pronouncements and affirm this cause on the decision on the third appeal.

By contending that there is a conflict in the holdings of the Mississippi Supreme Court in its decision of the first and third appeals of this cause, petitioner seeks to have this case passed on as fully as if it had been appealed directly to this Court instead of the Mississippi Supreme Court.

Counsel complains of the argument of respondent made on the third trial. There was not a hint in the Mississipp Supreme Court's decision of the first appeal of this cause about improper argument. There can therefore be no conflict in that respect between the Mississippi Supreme Court's holdings on the first appeal and third appeal.

The only reason petitioner raises no point here as to the instructions the ones used on the third trial were copied verbatum from those approved by the Mississippi Court on the second trial.

We refuse to go off into matters that cannot even under the theory of review advanced by petitioner be pertinent here.

If it be conceded that there is conflict in the opinions of the Mississippi Supreme Court as counsel contends, this would not entitle petitioner to a review here. Again and again this point of law has been decided adversely to pe-

titioner's contention by this Court.

In *Jones v. Buffalo Creek Coal Co.*, 245 U. S. 328, 38 Sct. 121, 62 U. S. (Lawyer's ed.) 325, is found:

> "It was the contention of the plaintiff below that the records and papers in the three suits established title in those under whom it claims; and also that the decrees in those suits created res judicata as against the defendants, because their predecessors in title had been parties or privies to those suits. The defendants below contended, among other things, that the premises in question were not within the tracts affected by one or more of the decrees in those suits, and that they were not bound by any of them. It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. *Central Land Co. v. Laidley*, 159 U.S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80." 62 U.S. (L. ed.) 326.

In volume 6, Section 44, R.C.L. and supplements are collected many decisions of this Court on this point.

Petitioner has had his day in Court. His case was passed on three times by the Circuit Court of Lauderdale County, Mississippi, and four times by the Supreme Court of Mississippi. The rules of law applying in the jurisdiction where petitioner, a Mississippi corporation, was sued were applied. We submit there were no errors made

by the Circuit Court or by the Supreme Court in hearing of this cause, but if errors were made, this Court is without authority to rectify those errors under the above authorities.

Petitioner has been accorded due process of the law and equal protection of the law according to the jurisdiction in which its case was tried. No Federal questions are involved, such as require a decision of this Court.

CONCLUSION

The decision of the Supreme Court of Mississippi is manifestly correct and presents neither a conflict of decision or any Federal question of general importance. The petition should therefore be denied.

Respectfully submitted,

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Of Counsel